Supreme Court, U.S.
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No. 96-

In The
Supreme Court of the United States
October Term 1996

CHAREL DANIELL,

Petitioner,

vs.

THE OLD LINE LIFE INSURANCE COMPANY OF AMERICA, UNITED STATES LIFE INSURANCE COMPANY, STANDARD MARKETING, INC., BUDGET TERM BROKERS, KEITH KLIMA, AND RANDY MURRAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in holding the District Court Rule that for protection under Title VII an employee-employer relationship must exist as determined by one stated factor taken from the hybrid test as set forth in *Spirides v. Reinhardt,* 613 F.2d 826, (D.C. Cir 1979). *Spirides* addressed the employment relationship issue in the context of 1972 amendments to Title VII that had extended the benefits of that statue to employees or applicants for employment with the Federal government 42 U.S.C § 2000e-16(a), emphasizing Congress' intent to limit the scope of coverage to Federal "employees" in contrast to the broad "any individual" standard for plaintiffs suing private employers under 703(a), 42 U.S.C. §2000e-2(a). The Fourth Circuit's holding is in conflict with other circuits that oppose the use of a test to indicate an aggrieved person's standing for plaintiffs suing private employers, and the test itself is in conflict with other test used in other circuits.

2. Whether the Fourth Circuit in holding the District Court's Rule that an employee-employer relationship did not exist therefore dismissing petitioner's claim erred in light of Chief Justice Burger's opinion in *Hishon v. King & Spalding* 467 U.S. 69 (1984) that "once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship"; also in light of the Restatement of the Law (Second) Agency 2d 2 which states that "an agent is a fiduciary that has the power to make the one employing him a party to a transaction and is subject to control by his employer over his conduct." This is exemplified in Common Law which acquiesces to the premise that Insurance Agents have employment contracts with the companies they represent who are their employers.

PARTIES

The party to this petition is Charel Daniell.

The parties in the courts below were Charel Daniell and The Old Line Life Insurance Company of America, United States Life Insurance Company, Standard Marketing, Inc., Budget Term Brokers, Keith Klima, and Randy Murray.

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PRIOR OPINIONS

The opinion sought to be reviewed is unpublished *per curium Daniell v. The Old Life Insurance Company* , No. 96-1394, (4th Cir. Nov. 18, 1996) upholding the lower court's ruling. *Daniell v. The Old Life Insurance Company, et al.*, CA-94-512-5-BR (E.D.N.C. Feb. 28, 1996).

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on January 15, 1997 by the United Stated Circuit Court of Appeals for the Fourth Circuit on rehearing in banc, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. §1254(1). This Petition is timely filed because it was mailed within ninety (90) days of January 15, 1997, the date of entry of judgment in the Court below. Rules 13.4 and 29.2.

STATUTES INVOLVED

1. 42 U.S.C. § 2000e, *et seq*.
2.. 42 U.S.C. §2000e-2(a)(1)
3. 42 U.S.C. §2000-3(a)
4. 42 U.S.C. §2000e-5
5. 42 U.S.C. §2000e(f)

STATEMENT OF THE CASE

Procedural History

On September 13, 1995, petitioner Charel Daniell filed a complaint in the United States District Court for the Eastern District of North Carolina. The District Court had jurisdiction under 42 U.S.C. §2000e-5(f)(3).

The complaint asserted that Daniell was employed by defendants in the capacity of an Insurance Agent hired to sell

insurance for Old Line Life and United Services Life; that a timely written charge was filed with the United States Equal Employment Opportunity Commission charging discrimination based on Sex; and that EEOC issued a "Notice of Right to SUE."

Defendants moved to dismiss under Rules 22(b)(1), (12)(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), and 56, asserting that Daniell's claims were not covered by Title VII because she was not an employee. The lower court dismissed plaintiffs' complaint on the grounds that she was not defendants' employee.

On appeal to the Fourth Circuit, a panel affirmed the reasoning of the lower court. U.S. Ct. of Appeals for the Fourth Circuit, No. 96-1394 (November 18, 1996).

On Petition for Rehearing with suggestion for rehearing in banc, it was ordered that the petition be denied. U.S. Ct. of Appeals for the Fourth Circuit, No. 96-1394; CA 94-512-5-BR (January 15, 1997).

Factual Summary

Charel Daniell alleges that she was employed by defendants Old Line Life, et al., as an agent to sell insurance and to hire and train other agents. She was employed for nearly two years when she alleges that she was discriminated against because of her sex, and she subsequently filed a charge with the EEOC. While her complaint was pending in EEOC, she was terminated by United Services Life. She subsequently filed an action under Title VII of the Civil Rights Act of 1964 ("the Act"), 42 U.S.C. §2000 e, *et seq.,* invoking the discrimination provisions in Section 703(a) 42 U.S.C. §2000e-2(a)(1) and the anti-retaliation provisions in Section 704(a), 42 U.S.C. §2000e-3(a).

VIII. ARGUMENT

The Circuit Courts of Appeals Are Split In their Interpretation Of this Important Statute

The Central Issue under 703(a) 42 U.S.C §2000e-2(a)(1) and 704(a) 42 U.S.C. §2000e-3 in many Cases citing many statutes of social legislation that have been, are being and will be litigated in the courts is who has standing to bring their grievance before the court. The answer to this question varies from circuit to circuit and within circuits from district to district. Thus depending upon the luck of the draw a claimant may find himself protected in one Circuit and not in another. It is obvious that it was not Congress' intention that an individual already burdened with a grievance be burdened further with inconsistent interpretations and that a judicial system be further taxed.

The courts currently are taking four different conflicting positions as to who is an employee and who is covered under the Civil Rights Act of 1964, Title VII. They are:

1. The term "individual" means that it is not at all necessary for a person to have a present employer-employee relationship with an employer in order to receive Title VII protection. The Act permits an "aggrieved person" to maintain a Title VII Action, and this term has a broader meaning than "employee".

2. To have protection one must be an employee under the economic realities test which primarily focuses on the economic dependence of the individual on the employer.

3. To have Title VII protection one must be an employee under the Common Law "Right to control" Test.

4. To have protection one must be an employee under the hybrid Common Law-Economic Realities Test in which the focus is the employers right to control.

When asking the question who is an employee there are two different contexts. The first 703 42 U.S.C. §2000e(b) concerns determining who an employer is by counting employees. The second 703 (a) 42 U.S.C. §2000e-2(a)(1), §2000e-2(a)(2), §2000 e-3 (a) involves some of the portions of the Act which establish what are lawful and unlawful employment practices. Most portions of the Act which define unlawful employment practices use the term "any individual" rather than "employee."

In this Courts recent unanimous opinion in *Robinson v. Shell Oil*, Supreme Ct., No. 95-1 376, (2-18-97), it was noted that "Finally, the use of the term individual in §704 (a) as well as in §703(a) 42 U.S.C. §2000e-2(a) provides no meaningful assistance in resolving this case. To be sure "individual" is a broader term than "employee" and would facially seem to cover a former employee. But it would also encompass a present employee as well as other persons who have never had an employment relationship with the employee at issue." This court also stated that ". . . the term "employee" may have a plain meaning in the context of a particular section - not that the term has the same meaning in all other sections and in all other contexts. . . each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute."

In *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422-25 (7th Cir. 1986) the doctor stated a claim under Title VII when the hospital denied staff privileges even though the doctor was not employee of the Hospital.

Hackett v. McGuire Bros., 445 F.2d , 442, 445 3 FEP 648 (3d Cir 1971), p. 445 states "In reaching the conclusion

that Hackett, as a pensioner, lacked standing the district court relied upon the definition of "employee" in Section 701(f) of Title VII, 42 U.S.C. §2000e(f), as "an individual employed by an employer." But that definition, in general section of the Title denoted to definitions, does not speak to the issue of standing to invoke the remedies of the Act. The remedies section is §706, 42 U.S.C. §2000e-5. That section permits "a person claiming to be aggrieved" to file a charge with the Commission. After proceedings before the Commission have continued for a specified time a suit may be started "by the person claiming to be aggrieved."

In *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338, 6 FEP 1029 (D.C. Cir 1973) , the hospital was asking the court to read into the term "any individual" a requirement that the individual stand in an employment relationship with the particular employer charged with discrimination. The hospital argued that, because no employment relationship existed between the plaintiff and the hospital, the plaintiff had no cause of action under Title VII. The United States Court of Appeals for the District of Columbia Circuit rejected this construction, pointing out that:

> The Act defines "employee" as "an individual employed by an employer," but nowhere are there words of limitation that restrict references in the Act to "any individual" as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of "any individual" to include only former employees and applicants for employment, in addition to present employees. Those words should therefore be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the ACT.

Thus, the key to the court's analysis was the hospital's control over the plaintiff's employment opportunities by determining his access to employment by patients. The focus of the court's inquiry, therefore, is on the economic realities of the relationship, particularly the dependency of the plaintiff on the hospital in obtaining employment opportunities , and the hospital's ability to deny access to those opportunities on invidious grounds. The formal relationship between the plaintiff and the hospital was irrelevant to a determination of whether the hospital had the power to affect the plaintiff's employment opportunities.

LeMasters v. Christ Hospital, 777 F Supp. 1378 (S.D. Ohio W.D. 1991) citing *Doe v. St. Joseph's Hospital of Fort Wayne,* 788 F.2d 411 (7th Cir 1986), "[T]he court noted that 42 U.S.C. §2000e-2(a) refers to "any individual" rather than "employee". *LeMasters v. Christ Hospital* citing *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291 (11th Cir. 1988), the Eleventh Circuit joined those endorsing the view that Title VII does not require an immediate employer-employee relationship. Also citing *Christopher v. Stouder Memorial Hospital* , 936 F.2d 870 (6th Cir. 1991) "[T]he Sixth circuit has specifically determined that Federal courts have jurisdiction to entertain claims make pursuant to 42 U.S.C. §2000e-3 where the defendant is in a position to interfere with the plaintiff's employment opportunities even though the plaintiff is not an employee of the defendant. Other cases are *Gomez v. Alexian Bros. Hospital* 698 F. d 1019, 30 FEP 1705 (9th Cir. 1983). *Pardazi v. Cullman Medical Ctr.,* 838 F.2d 1155, 46 FEP 236 (11th Cir 1988) and *Zaklama v. Mt. Sinai Medical Ctr.*,842 F.2d 291, 46 FEP 913 (11th Cir. 1988).

The Economic Realities test emerged in a series of Supreme Court decisions during the 1940's *NLRB v. Hearst Publications,* 322 U.S. Sup. Ct. 111 (1944). The Court based

it's decision primarily on the legislative purpose of the NLRA, considered the following facts:

1. The employees worked continuously and regularly for the employer.

2. They relied on the earnings from the employer to support themselves and their families

3. Their total wage was determined largely by the employer, who controlled their buying and selling prices, their market area and their supply of products.

4. Their hours of work and manner of performance were supervised and to some extent prescribed by the employer.

5. Much of their equipment and advertising materials was furnished by the employer for the employer's benefit.

Common Law distinctions were relied upon while implying that Common Law considerations were valid as long as they were not exclusively controlling. The court concluded that when employment status is doubtful, the applicability of the NLRA should be determined broadly upon examination of "underlying economic facts."

The Economics Realities test was further utilized in *United States v. Silk*, 1331 U.S. 704 (1947) and *Bartels v. Birmingham*, 333 U.S. 126 (1947). The factors in the *Silk* analysis included:

1. Permanency of the relation;
2. Skill required;
3. Investment in the facilities for work;
4. Opportunities for profit and loss from the activities ;
5. Integral part or not of the business from the stand point of is the employees work in; the course of the employer's trade or business; and

6. Whether the employee works regular is not significant.

The factors in the *Bartels* analysis included:

1. Employer organizes and trains;
2. Employer selects members;
3. Employer's skill and showmanship determines success or failure of organization;
4. Permanency; and
5. Bears the loss or gains the profit after payment of wages.

These tests developed before Congress changed the definition of employee as a response to the rulings in these cases. (The National Labor Relations Act, as amended (61 Stat. 136, 73; Stat. 519, 29 U.S.C. §151 *et seq.*) protects an "employee" only and specifically excludes "any individual having the status of independent contractor"). Since Congress chose not to change the definition of employee under the Fair Labor Standards Act and the Civil Rights Act of 1964, some courts interpreting that statue therefore have utilized the *Hearst-Silk* economic realities test and have focused on the dependency of the worker. Individuals are considered employees if "as a matter of economic reality they are dependent upon the business to which they render service." *See Frazier v. General Electric Co.*, 930 F.2d 1004, 1008 (2d Cir. 1991); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *Dole v. Elliott Travel and Tours, Inc.*, 942 F.2d 962, 965 (6th Cir 1991); *Mares v. Marsh*, 777 F.2d 1066, 1067 (5th cir 1985); *Real v. Driscoll Strawberry Assoc Inc.*, 603 F.2d 748, 754 (9th Cir 1979); *E.E.O.C. v. Dowd & Dowd. Ltd*, 736 F.2d 1177, 1178 (7th Cir. 1984). [The 7th circuit position as well as all test here are discussed in detail in , *Usha Vakharia, M.D. v. Swedish Covenant Hospital, et al.*, 765 F. Supp 461: 1991 U. S. Dist. Lexis 6976; 61 Fair Empl. Prac. Case (BNA 533 (N.D. of Ill E.D. 1991). It stated that "Although it is clear

that the strict Common Law Test, the most restrictive of the three, is not favored in this circuit, there is some confusion as to whether the hybrid test or the economic realities test is the proper Seventh Circuit Standard."]

In *Henderson v. Inter-chem Coal Co. Inc.*, 41 F.3d 567 citing *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989), instead stated "the economic realities of the relationship govern, and the focal point is" whether the individual is economically dependent on the business to which he renders service. . . or is, as a matter of economic fact, in business for himself." It was determined in *Henderson v. Inter-chem* that "Other facts from defendant's affidavits, however, tend to support an inference that Henderson was more economically dependent on defendants than not. First, Henderson was paid by the hour and worked primarily, if not exclusively, for the defendants. Thus, whether Henderson had a profitable year was wholly dependent on the defendants' situation. Second, the working relationship between Henderson and the defendants lasted approximately three years and four months. Finally, Henderson's work was not confined to a specific repair project, but instead consisted of repair of equipment as needed and requested by defendants. These facts could support inferences by a trier of fact that Henderson's work (1) was more controlled by defendants than not; (2) was an integral part of defendant's business; and (3) was permanent. These inferences in turn would support a legal conclusion that Henderson was an employee."

In contrast to this is the classic Common Law Test in which the Right to control is viewed as a relative factor. *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 751, 109 S. Ct. 2166, 2178, 104 L.Ed. 2d 811 (1989). "We turn, finally, to an application of §101 to Reid's production of 'Third World America.' In determining whether a hired party is an employee under the general common law of agency, we

consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required, the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *See*, *Ward*, 362 U.S. at 400; *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 321 (CA2 1982)."

The Court's Common Law inquiry into employee status under Title VII more than not has focused, therefore, on characteristics of the employment relationship that are easily measured, quantitative factors that indicate the employers ability to control the physical conduct of employees. As applied in Title VII cases, this often has led to a limited, mechanistic analysis of the employment relationship. The tendency to focus solely on a few easily measured factors, at the expense of excluding other potentially significant factors, is exemplified by this instant case.

The Fourth Circuit Court Of Appeals in this case based its decision on the fact that petitioner was paid by annualized commissions that were set forth and changed regularly by her employer. Courts applying the right to control test commonly have viewed the flexible work schedule and the commission compensation as indicative of employee autonomy; because the employer controls only the ultimate results of the work performed by there individuals. Totally absent from this analysis is an examination of the nature of the interaction

between these workers and the employer. The standards imposed on ultimate performance, the structure of the commission arrangement, the basis for and control of career opportunities or the dependence of the worker on support functions performed by the employer. This Court in *National Labor Relations Board v. United Insurance Co. of America*, 390 U.S. 254 (1968) determined that under the Common Laws of Agency, all the incidents of the relationship must be assessed and weighed with no one factor being decisive. It was set forth that the fact that the agents worked primarily away from the company's offices and fix their own hours of work and work days was not determinative and the fact that there Commission Plan that is promulgated and changed unilaterally by the company is an indication of there employee status.

The Fourth Circuit relied on a Hybrid test in *Spirides v. Reinhardt,* 613 F.2d 826, 20 FEP 141 (D.C. Cir 1979) [*Spirides* was a case to determine whether Spirides was an employee of the federal government or an independent contractor, under the Equal Employment Opportunity Act of 1972 42 U.S.C.. §2000e-16 (Supp. 11 1972) . The statute reads "(a) all personnel actions affecting employees or applicants for employment."] The Hybrid test calls for a combination of the economic realities test and Common Law. The hybrid test used in *Spirides* focused on the employers' Rights of Control. Even though *Spirides* said it was using the hybrid test, the factors listed were mostly Common Law. The test followed the items in Restatement (Second) of Agency §222(2) (1957) except (a) (b)and (j) were left out and 4 items were added. The items left out and added were:

(a) extent of control by the agreement the Master may exercise over the details.

(b) is one employed in a distinct occupation.

(j) whether the principal is or is not in business.

6. The manner in which the work relationship is terminated.
7. Whether annual leave is afforded.
8. Whether the work is an integral part of the business of the "employer."
9. whether the worker accumulates retirement benefits.
10. Whether the "employer pays social security taxes.

Many courts have followed the Spirides Test even though their statutes were not concerned with employees of the Federal Government. *Garrett v. Phillips Mills, Inc.,* 721 F.2d 979 (4th Cir. 1983); *Haavistola v. Community Fire,* 6 F. 3d 211 (4th cir 1993); *Cobb v. Sun Papers,* 673 F.2d 337 (11 cir. 1982).

Guidance of this Court Supports Coverage of Claimant

Some of the confusion has been clarified regarding some of the statutes. As clarified in *Nationwide Mutual Insurance Co et al. v, Darden*, 503 U.S. 318, 323-324 (1992). Regarding ERISA, it is stated "But *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee" which neither statue helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common -law principles were the keys to meaning." Also it was pointed out that the FLSA defined the verb "employ" expansively to mean "suffer or permit to work" and ERISA lacked that provision. Therefore the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of "employee."

There are two factors that seem to be determinative here. One is Congress passed an amendment clarifying what

test was to be used to distinguish between employee and independent contractor under the Social Security Act and the National Labor Relations Act. and specifically excluded Independent Contractors. Two, reliance on other statutes cases rests on textual asymmetry. Taking this guidance into consideration it is important to note that the Civil Rights Act of 1964 Title VII was written after the amendments to these other statutes and there has been no Congressional Amendment excluding Independent Contractors. Therefore the question becomes whether the wisdom of this court in past decisions and the wisdom of the circuits today should be abandoned. It is also important to note that unlike other statutes (NLRA, SSA,and ERISA) and more like FLSA, Title VII had a textual qualifier to 703(a) 42 U.S.C. §2000e-2(a)(l). The qualifier thus being 42 U.S.C. § 2000e-5(f) state.

More recent cases that provide guidance are as follows: *Robinson v. Shell Oil Company,* Supreme CT. 95-1376, BNA, Vol. 8, No. 8 271 (1997). ...."each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." Finding that the term "employees" in §704 (a) is ambiguous, we are left to resolve that ambiguity. The broader context provided by other sections of the statute provides considerable assistance in this regard." It was also held in *Darden* that the rest of the Act must give guidance as to he definition of employee.

United Steelworkers of America, AFL-CIO CLC v. Weber, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L. ED. 2d 480 (1979). A court charged with interpreting a statute is required to look beyond the plain language when that language is ambiguous, or when reliance on the literal language of the statute would defeat the purpose of the statute. Even though the language of the statute is unambiguous, a court still must

interpret the words of a Federal statute in the light of the purposes that Congress sought to serve.

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statue if reliance on that language would defeat the plain purpose of the statute: "The general words used in the clause. . . taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal--because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, a court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statue... and the objects and policy of the law. . . . "

Bob Jones University v. United States, 461 U.S. 574, 586, 103 S. Ct.2017,2025 76, L.Ed. 2d 157 (1983) (emphasis in the original). Thus, in determining the meaning of a statute, the court looks not only to the particular statutory language but also to the design of the statute as a whole and to its object and policy. *Crandon v. United States*, 494 U.S. 152,110 S.CT. 997, 108 L.Ed.2d 132 (1989); *Gonzalez v. Young*, 441 U.S. 600, 99 S. Ct.1905, 60 L.Ed. 2d 508 (1979). In the words of Judge Learned Hand:

> There is no surer guide in the interpretation of a statue than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at

carrying out that purpose because the words do not formally quite match it.

42 U.S.C. § 2000e Does State Definition of Employee Without Which the Plain Purpose of the Act Would Be Defeated

In some Statutes it is specifically stated that an employee is a servant in the Common Law meaning. This is not the case in Title VII which states in 42 U.S.C. §2000e that the term "employee" means an individual employed by an employer.

In Restatement (Second) of Agency §2, Ch. 1, the distinction between agents who are not servants and thus independent contractors and independent contractors who are not agents is explained. The relationship the agent independent contractor has with his principal is not the same as the relationship an independent contractor has with one he contracts with to provide a service. As stated in Agency §2 Ch. 1, p.14, "but he is not an agent, since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct." What becomes apparent in this distinction, is that there is no question as to whether the agent has an employment relationship with his principal employer; the question is whether the agent responds to the test for servants (employees) and therefore the employer is responsible for his physical conduct or the agent does not respond to the test for servants and therefore is an independent contractor and the principal has no liability for the torts of the agent. By virtue of the agency relationship Insurance Agents have an employment relationship with there principal employer and this fact has been acquiesced to throughout Common Law. Under the Common Laws of Agency, the Agent starts with an Employment Relationship in which he is employed by an employer.

43 *Am Jur* 2d §146 "The duty which an insurance agent owes the company which **employs him**..." (Emphasis added)

43 *Am Jur* 2d §153 "As a general rule, unless the contract of an agent provides for commissions on renewal premiums paid after the termination of his **employment**, ..." (Emphasis added)

Dixon v. Nationwide Mut Ins. Co. 784 F2d 1176 (4th Cir 1986), "Of course, the failure of an agent to solicit new business in more profitable insurance lines would provide the "**employer**" with an independent basis for firing the agent. *Hishon v. King and Spalding,* 467 U.S. 69 (1984) "**once a contractual relationship of employment** is established, the provisions of Title VII attach and govern certain aspects of that relationship." *Pioneer Investment Services Co. v. Brunswich Associates Ltd. Partnership,* 507 U.S. 380, 388 (1993). "In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary contemporary common meaning ." (Emphasis added)

CONCLUSION

For the foregoing reasons, this Court should grant the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:94-CV-512-BR(1)

CHAREL DANIELL	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE OLD LINE LIFE INSURANCE COMPANY OF AMERICA, UNITED SERVICES LIFE INSURANCE COMPANY, STANDARD MARKETING, INC., BUDGET TERM BROKERS, KEITH KLIMA and RANDY MURRAY,	)	ORDER
	)	
Defendants.	)	

This case is before the court on defendants' motion to dismiss and/or for summary judgment.

I. Background

Plaintiff alleges that she was employed by United States Security & Benefits Corporation of America ("Security")[1] and

---

[1] Plaintiff misidentified this defendant in her complaint as Budget Term Brokers. (Defs.'s Mem. in Supp.

Standard Marketing Services, Inc. ("Standard Marketing")[2] as an agent to sell insurance for Old Line Life Insurance Company of America ("Old Line") and United Servies Life Insurance Company ("United Servides"). (Compl. ¶ 11)

Old Line and United Services are insurance companies. Standard Marketing is an independent life insurance brokerage company that represents Old Line, United Services, and several other life insurance companies. (Klima Aff. ¶ 3) As an agent, Standard Marketing can sponsor or recommend other agents who wish to sell iinsurance for the companies it represents. (Murray Aff. ¶ 9; Howe Aff. ¶ 5)

Murray and Klima are shareholders in Security. (Klima Aff. ¶ 9); Murray Aff. ¶ 2) Murray is also an employee of Security. (Murray Aff. ¶ 8) Both men are shareholders and employees of Standard Marketing. (Klima Aff. ¶ 1; Murray Aff. ¶ 1)

Standard Marketing alleges that it never employed plaintiff. (Klima Aff. ¶ 5) Standard Marketing asserts that it merely sponsored plaintiff to sell life insurance for Old Line and United Services. (Murray Aff. ¶ 8)

On July 18, 1990, plaintiff entered into an agency agreement with Old Line. (Old Line Life OSB Agency Agreement dtd. 7/18/90 (hereinafter "Old Line Agreement")) The agreement authorized plaintiff to sell Old Line's products. (Id.) Although Standard Marketing was not a party to the agreement, (id. at 1 ("This agreement is made . . . between The Old Line Life Insurance Company of America . . . and the OSB Agency signing this agreement . . . .")), Murray signed the

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of Mot. to Dismiss and/or for Summ. J. at 1)

[2] Plaintiff misidentifed this defendant in her complaint as Standard Marketing, Inc. (Defs.'s Mem. in Supp. of Mot. to Dismiss and/or for Summ. J. at 1)

agreement as plaintiff's sponsor. (Id.) Standard Marketing, as sponsor, was entitled to overwrite commissions on the business plaintiff generated for Old Line. (Howe Aff. ¶ 6; Murray Aff. ¶ 10) Old Line states that plaintiff's agency relationship with its company has never been terminated. (Howe Aff. ¶ 16)

Standard Marketing also sponsored plaintifffor an agency appointment with United Services's predecessor. (Murray Aff. ¶ 11) In due course, plaintiff and United Services entered into an agency agreement allowing plaintiff to sell United Services's products. (United Olympic Life Insurance Company Profession Sales Agreement dtd. 9/5/91 (hereinafter "United Services Agreement")) Standard Marketing was not a party to the agreement. (Id. at 1 ("This Agreement made . . . between United Olympic Life Insurance Company . . . and Charel Lee Daniell . . . .")) Pursuant to a separate agreement with United Services, Standard Marketing received, as plaintiff's sponsor, a commission on the business plaintiff generated. (Podlesney Aff. ¶ 5; Murray Aff. ¶ 11) According to United Services, plaintiff continued to serve as agent for the company until July 15, 1993, when United Services terminated the relationship because of plaintiff's failure to meet productivity requirements (Podlesney Aff. ¶ 20)

Security argues that not only did it never employ plaintiff, but that it never retained her as an independent contractor, acted as her sponsor, or otherwise recommended her to sell insurance. (Klima Aff. ¶ 10)

In July 1994, plaintiff filed suit against defendants alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994). Specifically, she alleged that defendants discriminated against her on the basis of sex by: (1) failing to assign her the same number of territories in which to sell insurance policies as her male counterparts, (Compl ¶ 15); (2) failing to assign agents to her at the same rate as her male counterparts, (id. ¶ 17); (3) discriminating against her in the terms and conditions of her

employment, (id. ¶ 18); and (4) terminating her employment by cancelling her contracts with Old Line and United Services. (id. ¶ 20) Plaintiff also alleges a state law claim of interference with contract. (Id. ¶¶ 27-32)

Defendants responded to plaintiff's complaint by filing a motion to dismiss and/or for summary judgment. Thereafter, plaintiff requested and received not one, but two extensions of time in which to file her response to defendants' motion. The second extension afforded plaintiff until December 18, 1995 to file her response. Nevertheless, plaintiff filed her response one day late.

II. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a mater of law. Fed. R. Civ. P. 56(c). The Fourth Circuit has articulated the summary judgment standard as follows:

> A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., [477 U.S. 242, 248 (1986)]. In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. Id. at 255. The plaintiff is entitled to have the credibility of all his evidence presumed. Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990), cert. denied, [498 U.S. 1109 (1991)]. The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, [477 U.S. 317, 325 (1986)]. The

> opposing party must demonstrate that a triable issue of fact exists; he may not rest on mere allegations or denials, Anderson, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. Id.

Patterson v. McLean Credit Union, 39 F.3d 515, 518 (4th Cir. 1994) (quoting Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994), cert. denied, 115 S. Ct. 67 (1994), 115 S. Ct 68 (1994)).

III. Discussion

Title VII of the Civil Rights Act outlines the following unlawful conduct:

> It shall be unlawful employment practice for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (1994). The term "employee" is defined as "an individual employed by an employer." Id. § 2000e(f). In this case, defendants argue that plaintiff was not their "employee." At best, they argue, she was an independent contractor and thus, Title VII does not apply.

In Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983), the Fourth Circuit set forth the standard to be applied in

this Circuit for determining whether an individual is an employee or an independent contractor.[3] The determination, it stated, is properly made "by analyzing the facts of each employment relationship under a standard that incorporates both the common law test derived from principles of agency and the so-called 'economic realities' test first announced in Bartels v. Birmingham, [332 U.S. 126 (1947)]." Id. at 981.

As the Fourth Circuit explained, "[t]he common law standard traditionally used when deciding whether an individual can claim employee status emphasizes the importance of the employer's control over the individual." Id. However, the Fourth Circuit continued, "[i]n Bartels, the Supreme Court decided that the common law 'right to control' test was too rigid to serve as a useful tool in deciding employee status in cases arising under remedial social legislation." Id. The Bartels Court stated:

> Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In United States v. Silk, [331 U.S. 704 (1947)], we

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[3] In Garrett, the Fourth Circuit construed the term "employee" under the Agen Discrimination in Employment Act ("ADEA"). The Fourth Circuit subsequently noted that the operative language in the ADEA is identical to the operative language in Title VII and thus, that the analysis announced in Garrett applies in Title VII cases. Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 219 n.2 (4th Cir. 1993). In fact this conclusion was implicit in Garrett. See Garrett, 721 F.2d at 981.

> pointed out that permanency of the relation, the skill required, the investment in the facilities for work, and opportunities for profit or loss from the activities were also factors that should enter into judicial determiantion . . . . It is the total situation that controls.

Bartels, 332 U.S. at 130.

In Garrett, the Fourth Circuit noted that "[a]lthough the 'economic realities' test continues to have general applicability in the interpretation of certain remedial statutes, most courts deciding the issue of employee status in Title VII cases have utilized a combination of both the 'economic realities test' and the common law right-of-control test. Garrett, 721 F.2d at 981 (footnotes omitted). The Fourth Circuit then elaborated on the hybrid test:

> Under [the hybrid] test, control is still the most important factor to be considered, but is not dispositive. [EEOC v. Zippo Manuf. Co., 713 F.2d 32, 37 (3d Cir. 1983).] Other important considerations include:
>
> > (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of

> payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.
>
> Spirides v. Reinhardt, [613 F.2d 826, 832 (D.C. Cir. 1979)].

Garrett, 712 F.2d at 982. With these principles in mind, the court turns to the case at hand.

In their motion for summary judgment, defendants set forth the following facts in support of their argument that plaintiff was an independent contractor. Defendants assert that they exercised little, if any, control over plaintiff. (Howe Aff. ¶ 8; Podlesney Aff. ¶ 8) Specifically, they argue the following: plaintiff could sell insurance wherever Old Line or United Services were authorized to do business, (Howe Aff. ¶ 9; Podlesney Aff. ¶ 8); neither Old Line nor United Services assigned plaintiff territories, (Howe Aff. ¶ 9; Podlesney Aff. ¶ 8); plaintiff could sell any type of policy to her customers, (Howe Aff. ¶ 10; Podlesney Aff. ¶ 8); plaintiff could use any lawful method to solicit sales, (Howe Aaff. ¶ 11; Podlesney Aff. ¶ 8); plaintiff was responsible for the costs of her sales methods, licensing fees, and travel and entertainment expenses, (Howe Aff. ¶¶ 11-12; Podlesney Aff. ¶ 12); plaintiff could maintain an office anywhere in the United States, (Howe Aff.

¶ 30; Podlesney Aff. ¶ 16; Murray Aff. ¶ 17)

Plaintiff received no supervision from defendants. (Howe Aff. ¶ 17; Podlesney Aff. ¶ 10) She did not have to report regularly, (Howe Aff. ¶ 19; Podlesney Aff. ¶ 11; Murray Aff. ¶ 15), and was free to set her own work schedule, office hours, and vacations. (Howe Aff. ¶ 18; Podlesney Aff. ¶ 10; Murray Aff. ¶ 16) Her performance was not evaluated by defendants. (Howe Aff. ¶ 20; Podlesney Aff. ¶ 11; Murray Aff. ¶ 15)

Plaintiff maintained her own office space and supplied her own office equipment. (Howe Aff. ¶ 21; Podlesney Aff. ¶ 12) The only materials provided to her by defendants were policy applications, forms, and related materials. (Howe Aff. ¶ 22; Podlesney Aff. ¶ 12)

Plaintiff was paid on a commission basis by Old Line and United Services. (Howe Aff. ¶ 23; Podlesney Aff. ¶ 13) She has never received any salary, fees, or commissions from Standard Marketing. (Murray Aff. ¶ 12).

Plaintiff's relationship with both United Services and Old Line was terminable at will by either party. (Old Line Agreement; United Services Agreement) Standard Marketing was free to remove its sponsorship of plaintiff at any time with or without cause. (Murray Aff. ¶ 14)

Plaintiff has never received any annual leave from Old Line or United Services. (Howe Aff. ¶ 28; Podlesney Aff. ¶ 15)

Plaintiff is not entitled to retirement benefits from Old Line, United Services, or Standard Marketing. (Howe Aff. ¶ 29; Podlesney Aff. ¶ 15; Murray Aff. ¶ 12)

No taxes were ever withheld from plaintiff's commission checks issued by Old Line or United Services. (Howe Aff. ¶ 26; Podlesney Aff. ¶ 14)

Finally, plaintiff's agreements with Old Line and United Services expressly provided that she was to be an independent contractor. The Old Line agreement stated: "The relationship between the Company and the OSB Agency shall be that of

principal and independent contractor, and not that of employer and employee." (Old Line Life Agreement) Likewise, the United Services agreement stated: "You understand and agree that your relationship with the Company is that of an independent contractor." (United Services Agreement)

Plaintiff asserts several facts in support of her argument that defendants "totally controlled" the means and manner in which she performed her work. In some cases, plaintiff asserts facts that do not contradict those raised by defendants. Instead, she appears to argue that the uncontradicted facts support a conclusion that she is an employee rather than an independent contractor. For example, plaintiff asserts, as defendants did, that she was compensated on a commission basis. Contrary to plaintiff's assertions, this fact, like the other uncontradicted facts that she raises, tends to show that she was an independent contractor.

Other facts asserted by plaintiff do contradict those presented by defendants. For example, plaintiff asserts that she was prohibited from using any marketing tool other than that provided by defendants. As stated above, defendants assert that plaintiff was free to use any lawful means to solicit business. When considering defendants' motion for summary judgment, the court must, of course, take plaintiff's version of the facts as true. Notwithstanding the fact that plaintiff's presentation creates a number of disputed facts in the record, they are not material so as to preclude summary judgment. The uncontradicted, undisputed facts establish that, as a matter of law, plaintiff was not defendants' employee.

Finally, there is no merit to plaintiff's argument that summary judgment is unsuitable in employment discrimination cases where the ultimate issue of fact is the motivation of the employer. The court need not even reach the issue of the employer's motivation if Title VII is, as here, inapplicable because there is no employer-employee relationship.

For the reasons discussed above, defendants' motion for

summary judgment on plaintiff's Title VII claim is GRANTED. The court declines to exercise jurisdiction over plaintiff's state law claim. This case is, therefore, DISMISSED.

This 25 February 1996.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

cd/olli/js

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1394

CHAREL DANIELL,

Plaintiff - Appellant,

versus

THE OLD LINE LIFE INSURANCE COMPANYOF AMERICA; UNITED SERVICES LIFEINSURANCE COMPANY; STANDARD MARKETING, INCORPORATED; BUDGET TERM BROKERS; KEITH KLIMA; RANDY MURRAY,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA-94-512-5-BR)

Submitted: November 7, 1996 Decided: November 18, 1996

Before RUSSELL and WIDENER, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Charel Daniell, Appellant Pro Se. George Jerald Oliver, Matthew Woodruff Sawchak, SMITH, HELMS, MULLISS & MOORE, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM

Appellant appeals from the district court's order dismissing her discrimination in employment and contract claims. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Daniell v. The Old Line Life Ins. Co. of Am., No. CA-94-512-5-BR (E.D.N.C. Feb. 28, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 15, 1997

No. 96-1394
CA-94-512-5-br

CHAREL DANIELL

Plaintiff - Appellant

v.

THE OLD LINE LIFE INSURANCE COMPANY OF AMERICA; UNITED SERVICES LIFE INSURANCE COMPANY; STANDARD MARKETING, INCORPORATED; BUDGET TERM BROKERS; KEITH KLIMA; RANDY MURRAY

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for

rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CHAREL DANIELL	)	
	)	
	)	
v.	)	
	)	
THE OLD LINE LIFE INSURANCE COMPANY OF AMERICA, UNITED SERVICES LIFE INSURANCE COMPANY, STANDARD MARKETING,INC., BUDGET TERM BROKERS, KEITH KLIMA and RANDY MURRAY	)	**JUDGMENT IN A CIVIL CASE**

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment on plaintiff's Title VII claim is GRANTED. The court declines to exercise jurisdiction over plaintiff's state law claim. Therefore, this action is hereby DISMISSED. (BRITT, J)

THIS JUDGMENT FILED AND ENTERED ON WEDNESDAY, FEBRUARY 28, 1996:

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February 28, 1996

DAVID W. DANIEL, CLERK

/s/ Jolie Skinner
(By) Deputy Clerk

STATUTES
APPENDIX TO PETITION

1. 703(a), 42 U.S.C. § 2000e-2(a)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

2. 706, 42 U.S.C. § 2000e-5

. . . . . .

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . .

(f)(1) . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission . . . shall so notify the person agrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

3. 42 U.S.C. § 2000e

2000e. Definitions

For the purposes of this subchapter.

(f) The term "employee" means an individual employed by an employer . . . .